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Nos. 95-1508 & 95-1455

In the Supreme Court of the United States
October Term, 1995

GEORGE PRICE, *et al.*,
Appellants,
v.
BOSSIER PARISH SCHOOL BOARD,
Appellee.

and

JANET RENO, Attorney General
of the United States,
Appellant,
v.
BOSSIER PARISH SCHOOL BOARD,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus

curiae in support of appellee, Bossier Parish School Board. All parties have consented to the filing of this amicus brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other Voting Rights Act cases before this Court including *Lopez v. Monterey County, California*, Docket No. 95-1201; *Abrams v. Johnson*, Docket Nos. 95-1425, 95-1460; *Bush v. Vera*, __ U.S. __, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, __ U.S. __, 116 S. Ct. 1894 (1996); *Louisiana v. Hays*, __ U.S. __, 115 S. Ct. 2431 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); and *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. 419 (1991).

PLF believes that racial classifications by government, both in the voting rights context and otherwise, are inherently suspect and, absent extraordinary circumstances, unconstitutional. In this case, the appellants seek to use the Voting Rights Act as a vehicle to promote racial quotas in elective office. PLF believes that this attempted means, which

implicates critical federalism concerns, must be emphatically rejected by this Court.

OPINION BELOW

The opinion of the United States District Court for the District of Columbia, holding that an inquiry based on Section 2 of the Voting Rights Act cannot be imported into a Section 5 preclearance proceeding, is reported at 907 F. Supp. 434 (D.D.C. 1995).

STATEMENT OF THE CASE

The Bossier Parish School Board (School Board or Board), located in northwestern Louisiana, sought preclearance of a redistricting plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *Bossier Parish School Board v. Reno*, 907 F. Supp. at 437. The School Board needed to redistrict because the 1990 census showed markedly divergent populations among the Board's 12 districts. Members of the School Board were elected by majority vote. In the School Board's history, no black candidate had been elected to membership. However, the Board did appoint a black member to a vacant seat in 1992. *Id.* at 437-38.

The School Board initially approached the governing body of the parish, known as the "Police Jury" to see if they could jointly redistrict. The Police Jury also has 12 members. The Police Jury declined to work with the School Board, however, because of different incumbency concerns. *Id.* at 438. The Police Jury drew up a plan which was subsequently precleared by the Department of Justice (DOJ) and went into effect. The School Board then hired the same

cartographer and went to work on its own plan. *Id.* at 438. Meanwhile, the local National Association for the Advancement of Colored People (NAACP) wanted to become involved in the process and specifically said that it would dispute any plan that did not provide for majority-black districts. *Id.* The NAACP drew up its own plan containing two majority-black districts and presented it to the School Board. However, the Parish District Attorney dismissed the NAACP plan because it required splitting 46 voting precincts in violation of Louisiana law. *Id.* at 438.

In the midst of this controversy, the School Board decided to sidestep further escalation by adopting the Police Jury plan as its own. *Id.* at 439. The School Board submitted the plan to the DOJ for preclearance. Despite the fact that the DOJ precleared the identical plan for the Police Jury, the DOJ refused to preclear the School Board plan on the basis of "new information," namely, the existence of the NAACP plan, which the DOJ preferred. *Id.*

For a political subdivision subject to Section 5 to obtain preclearance of a voting change, it must prove that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. The "effect" prong of Section 5 requires a showing of retrogression. *Beer v. United States*, 425 U.S. 130, 141 (1976). All parties in this case agree that there is no retrogressive effect from the School Board's proposed redistricting plan. *Bossier Parish*, 907 F. Supp. at 440. Thus, the School Board must demonstrate that the redistricting plan was enacted without a discriminatory purpose.

The School Board argued it had several legitimate purposes: to avoid controversy, to keep precincts intact, to adhere to traditional districting principles, and to avoid racial gerrymandering. *Id.* The DOJ, on the other hand, argued that preclearance should be denied because either (1) the

redistricting plan itself violates Section 2 of the Voting Rights Act; or (2) a Section 2 violation is evidence of discriminatory purpose. *Id.*[1]

The District Court in this case rejected the DOJ's attempt to merge these two very different sections--Section 2 and Section 5--of the Voting Rights Act. *Id.* at 440-41. The DOJ appealed to this Court and the Court noted probable jurisdiction on June 3, 1996.

SUMMARY OF ARGUMENT

Appellants in this case seek to merge Sections 2 and 5 of the Voting Rights Act. First, appellants seek direct importation of Section 2, a broad-ranging statute designed to combat discriminatory actions relating to participation in the political process, into Section 5, the preclearance provision for certain covered jurisdictions. Such importation is directly contrary to the language and intent of the Voting Rights Act, including the 1982 amendments. For this reason, every court which has considered this argument has rejected it. Next, appellants argue that even if Section 2 cannot be directly imported into Section 5, then evidence of a Section 2 violation may still appropriately be used to deny preclearance. In this way, appellants seek the same result indirectly as they do directly; and for the same reasons, this argument should be rejected. Moreover, the merger of Section 2 and Section 5 (whether direct or indirect) would

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[1]Section 2 of the Voting Rights Act provides, in part, that "no voting qualification or prerequisite to voting, or standards, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973.

exact severe costs on the federalism doctrine which forms the basis for American governance.

ARGUMENT

I

THE FEDERALISM COSTS ALREADY EXACTED BY SECTION 5 SHOULD NOT BE EXACERBATED BY EXPANDING A SECTION 5 PRECLEARANCE PROCEEDING TO INCLUDE SECTION 2 LITIGATION

A statute will not be construed to undercut state authority unless the congressional enactment clearly and expressly states that purpose. A state's sovereignty, consistent with the Tenth Amendment,[2] must be recognized in determining the extent to which federal courts and the DOJ will be permitted to restructure election changes made without discrimination. Federalism concerns consistent with the Tenth Amendment have been formalized by the rule that a statute will not be construed to undercut state authority unless there is a showing of the "unambiguous intent" of Congress to effect the purpose. *New York v. United States*, 505 U.S. 144, 171 (1992). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* Even as

[2]The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. U.S. Const. Amend. X.

construed in *Beer*, 425 U.S. at 141, Section 5 is indisputably a serious intrusion into the normal federal-state balance of authority. *See, e.g., United States v. Board of Commissioners*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). To go beyond the retrogression limits of the freezing remedy permitted by *Beer* would be a huge extension of Section 5, an extension for which there is a glaring absence of the necessary clear statement from Congress.

This Court first considered the constitutionality of Section 5 in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In that case, South Carolina challenged Congress' authority to require federal approval of proposed state laws, claiming that Section 5 violated the Tenth Amendment by encroaching on powers reserved to the states. *Id.* at 323. The Court responded that the states' power to violate the Fifteenth Amendment is nowhere protected in the Constitution: "The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power." *Id.* at 325; *see also City of Rome v. United States*, 446 U.S. 156, 202 (1980) (Powell, J., dissenting) ("[p]reclearance [is] a prophylactic measure based on the remedial power of Congress to enforce the Fifteenth Amendment"). In dissent, Justice Black's primary constitutional objection was that through the Act's preclearance requirement the United States was usurping power from the states in flagrant violation of the Tenth Amendment. *See Katzenbach*, 383 U.S. at 358-61 (Black, J., concurring in part and dissenting in part). By requiring federal approval before a state can enforce its laws, he maintained, Section 5 "so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless." *Id.* at 358 (Black, J., concurring in part and dissenting in part). Congress' power to enforce the Fifteenth Amendment, he believed, does not encompass such a shift of power from the states to the federal government. *Id.*

at 357-58 (Black, J., concurring in part and dissenting in part). Justice Black's dissent confronted this tension in stark and explicit terms:

> I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.

Id. at 359-60 (Black, J., concurring and dissenting).

The court below recognized that this Court's decision upholding Section 5 in *Katzenbach* was a

> "necessary and constitutional response to some states" "extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." ... But [its] belief in *Katzenbach* that the federalism costs exacted by Sec. 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case.

Bossier Parish, 907 F. Supp. at 444, citing *Miller v. Johnson*, __ U.S. __, 115 S. Ct. 2475, 2493 (1995)) (quoting *Katzenbach*, 383 U.S. at 335). The court below further noted that the federalism costs of Section 5 by itself have been noted throughout its history. *See Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting) ("It is indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a

State to submit its legislation for advance review"); *Katzenbach*, 383 U.S. at 359-60 (Black, J., dissenting in part) ("[Section 5] gives federal officials power to veto state laws they do not like ... in direct conflict with the clear command of our Constitution that '[t]he United States shall guarantee to every State in this Union a Republican Form of Government'");[3] *Georgia v. Reno*, 881 F. Supp. 7, 13 n.8 (D.D.C. 1995) (noting that the "extraordinary nature of section 5" argued against importing Section 2 into Section 5). Although *Miller* makes no explicit reference to the injection of Section 2 into Section 5, the import of the opinion on this issue is clear. So long as the standard for the "effect" prong of Section 5 remains "nonretrogression," the only way for the DOJ to require the creation of additional majority-black districts before preclearance will be granted is to import the standards of Section 2 into the Section 5 preclearance process. *Bossier Parish*, 907 F. Supp. at 444-45 and n.10.

The Tenth Amendment concerns may be analyzed under this Court's recent revival of Tenth Amendment jurisprudence in analogous situations. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), for example, this Court relied heavily on the sanctity of state sovereignty in refusing to enforce a federal statute in conflict with a mandatory retirement law for judges. In *New York v. United States*, 505 U.S. 144 (1992), this Court struck down that part of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1985) (codified at

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[3]One commentator expands on this idea that intrusion into state election laws may deprive those states of a guaranteed republican form of government under Article IV, Section 4, of the United States Constitution--the Guarantee Clause. *See generally* Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994).

42 U.S.C. § 2021b, *et seq.*), requiring states either to regulate the disposal of low-level radioactive waste according to Congress' instructions or accept ownership of (and liability for) it. *New York*, 505 U.S. at 149. This Court held that the statute would unconstitutionally force the states to implement legislation enacted by Congress. *Id.* at 188. Using the classifying language of the Voting Rights Act, this Court added, in dicta, that "[s]tates are not mere political subdivisions of the United States." *Id.* Although not doubting Congress' power under the Supremacy Clause to legislate in areas of state law, *Gregory*, 501 U.S. at 457, the Court emphasized that the statutory language must make Congress' intention to do so "unmistakably clear." *Id.* at 460.

The Court echoed Justice Black's states'-rights concerns in *Katzenbach* by reiterating that "[j]ust as 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,'" *Gregory*, 501 U.S. at 461-62 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970)), so also "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Id.* at 462 (quoting *Boyd v. Thayer*, 143 U.S. 135, 161 (1892)). The mandatory retirement law for judges did not involve voting per se, but did affect the prerequisites to holding state office, as in *Allen v. State Board of Elections*, 393 U.S. 544, 570 (1969). Such electoral authority, the Court said, "lies at 'the heart of representative government.'" *Gregory*, 501 U.S. at 462 (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)). *Gregory*, in a different context, conveys essentially the same constitutional message as Justice Black's in *Katzenbach*, 383 U.S. at 358-62 (Black, J., concurring in part and dissenting in part). Thus, there is a strong suggestion that *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), decided about six months later, was informed by many of the same concerns for federalism set forth in detail in *Gregory*. Carter, *Mere Voting: Presley v.*

Etowah County Commission and the Voting Rights Act of 1965, 71 N.C. L. REV. 569, 591-93 (1993). As this Court stated, "[i]f federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments." *Presley*, 502 U.S. at 510.

Consideration of the likely practical consequences of merging Section 2 and Section 5 demonstrates the magnitude of the intrusion on state autonomy. Because this Court has interpreted what qualifies as a voting "change" very broadly, *see Allen*, 393 U.S. at 563-71, whenever a covered jurisdiction desires to make even a purely administrative change in its voting laws, it would face the daunting prospect of defending its entire electoral system as nondiscriminatory if it is to avoid an inference of discriminatory purpose. Moreover, unlike a Section 2 proceeding in which the plaintiff bears the burden of proof, *see New York v. United States*, 874 F. Supp. at 397, and which may be litigated in a local federal forum, a Section 5 proceeding imposes considerable procedural disadvantages on the state, including the burden of proving that there is no discriminatory effect or purpose, *see Katzenbach*, 383 U.S. at 335,[4] and the inconvenience and expense of litigating in the often distant District of Columbia forum. *See* 42 U.S.C. § 1973c. The prospect of litigation under such terms may well paralyze the state's ability to address routine administrative problems. Consequently, a merger of Sections 2 and 5 would enable the DOJ to wield its preclearance power as a sword to coerce ameliorative steps by a state, rather than as the intended shield against retrogression in minority exercise of the ballot. *See, e.g., McCain v. Lybrand*, 465 U.S. 236, 246 (1984)

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[4]The court below noted the anomolous result where a voting change is conceded to have no retrogressive effect: the state must prove that when "it did nothing bad, it did so with a non-bad motive." *Bossier Parish*, 907 F. Supp. at 446 n.13.

(the Act must be "interpreted in light of its prophylactic purpose and the historical experience which it reflects").

II

NEITHER SECTION 2 NOR EVIDENCE OF AN ALLEGED SECTION 2 VIOLATION MAY BE IMPORTED INTO A SECTION 5 PRECLEARANCE PROCEEDING

Congress amended Section 2 of the Voting Rights Act to address this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which held that evidence of disproportionate impact was not sufficient to prove a violation of the Fifteenth Amendment or, by extension, Section 2 of the Voting Rights Act. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). To ensure that any voting practice that denied minorities the equal opportunity to participate in the political process could be challenged, regardless of the intent behind its enactment, Congress made major changes to the text of Section 2 which make it clear that plaintiffs do not have to demonstrate purposeful discrimination to prevail. *See id.* at 42-46. Congress also amended the language of Section 4 to incorporate this standard into the bail-out provisions. *See* 42 U.S.C.§ 1973b(a)(1)(F)(I).

At the same time, the temporary legislation contained in Section 5 was extended, but without substantive changes to the statutory language. The DOJ's argument that Section 5 was expanded in similar fashion to Section 2 is meritless. Section 5 was not changed substantively in any way. If Congress intended to revise Section 5 to permit review of electoral practices regardless of when enacted, and regardless of retrogression, the wording of Section 5 surely would have been changed in 1982. That is particularly true in light of the unequivocal construction given to Section 5 in *Beer v. United States*, 425 U.S. at 130.

In *Beer*, the city of New Orleans sought preclearance of a reapportionment plan that would have increased black voting strength. *Id.* at 135-36. The DOJ refused to preclear the plan on the grounds that the new reapportionment was nonetheless discriminatory because it diluted black votes. *Id.* at 136. This Court held that if a proposed change augments minority voter participation, even though it may still have some discriminatory effect, it cannot violate Section 5. *Id.* at 141. Changes are judged under Section 5 relative to what they replace and not in absolute terms. *Id.* at 141. Thus, Section 5 applies only to changes that would lead to a relative retrogression in minority voting. *Id.* Of course, this rule holds true only so long as the proposed change does not otherwise violate the Constitution. *Id.* In *Presley v. Etowah County Commission*, 502 U.S. 491, this Court held that while great deference ordinarily is afforded to the Attorney General's interpretation of the Voting Rights Act, there are limits to that deference. *Presley*, 502 U.S. at 508 ("[d]eference does not mean acquiescence"). Only when congressional intent is unsettled does this Court owe deference to the Attorney General's construction. *Id.* Since this Court found Section 5 unambiguous in limiting its coverage to rules governing voting, it felt no compulsion to defer to the administrative position. *Id.* at 509. Justice Kennedy concluded the Court's opinion by emphasizing that the Voting Rights Act was drafted to fight "specific evils" and should not be stretched beyond recognition to cover all manner and method of discrimination. *Id.*

In *Bush v. Vera*, 116 S. Ct. 1941, decided this Term, this Court again forthrightly stated the limited purpose of Section 5: "§ 5 has a limited substantive goal: 'to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Bush*, 116 S. Ct. at 1949 (citing *Miller*, 115 S. Ct. at 2483) (quoting *Beer v. United States*, 425 U.S.

130, 141 (1976)). In *Bush*, this Court rejected the argument that seeks to justify "not maintenance, but substantial augmentation, of the African-American population percentage in [the district]." *Bush*, 116 S. Ct. at 1950. Thus, this Court's interpretation of the purpose and scope of Section 5 remained unchanged up to and including decisions rendered this Term. Yet, the DOJ continues to advocate an interpretation of Section 5 that extends far beyond permissible boundaries.

A. Section 2 May Not Be Imported into Section 5

Noting the differences in "structure, purpose, and application" between Sections 2 and 5 (*Bossier Parish*, 907 F. Supp. at 442 (citing *Holder v. Hall*, __ U.S. __, 114 S. Ct. 2581, 2587 (1994))), the court below found that it had no cause to delve into legislative history as an interpretive aid. *Id.* at 442. Nonetheless, common sense and normal rules of statutory construction fully comport with the District Court's decision. Congress does not change a statute's meaning when it does not amend the statute. An analogous argument to that presented by the DOJ in this case arose in *Pierce v. Underwood*, 487 U.S. 552, 567-68 (1988). *Pierce* involved the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which allows fee awards against the United States in certain cases. Like Section 5, that provision of law was originally enacted as temporary legislation. The Act was extended in 1985 but, before its extension, several lower federal courts had construed EAJA to permit an award of fees only in those cases where the government's conduct had not been "reasonable." When the EAJA was extended in 1985, the provision at issue was unchanged, but a committee report that accompanied the extension legislation stated that the government must show that its conduct was "more than merely reasonable" to avoid attorneys' fees. *Pierce*, 487 U.S. at 566. The plaintiffs in *Pierce* relied on this report in their unsuccessful attempt to invoke the higher standard.

The DOJ's contention that Section 2 should be imported into Section 5 is also based on legislative history. *Bossier Parish*, 907 F. Supp. at 441.[5] However, the Section 5 legislative history is even more attenuated than that at issue in *Pierce*. One footnote buried in the lengthy Senate Committee Report simply states: "[I]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982). But, just as in *Pierce*, this passing comment in the legislative history is irrelevant in construing Section 5 because the language of Section 5 itself contained no change, much less the kind of change that would support a radical repeal of the *Beer* retrogression principle. This Court resolved the analogous situation in *Pierce* by holding that the extended, but unamended, terms

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[5]The DOJ's infusion of Section 2 principles into the preclearance proceeding is obvious from the language in its letter of objection that the School Board "is not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice," *Bossier Parish*, 907 F. Supp. at 439, and its letter of August 30, 1993: "[T]he proposed plan, adopted by the parish police jury and recommended by the school board's consultant, *would appear to provide no opportunity for black voters to elect a candidate of their choice* to the school board." *Id.* at 445 n.11 (emphasis in original). This language echoes the language of Section 2, which provides that a voting procedure has the prohibited result where "based on the totality of circumstances, it is shown that the political processes ... are not equally open to participation by members of a [protected] class ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973b.

of the statute necessarily remained unchanged, and the later legislative history had no weight:

> (Quite obviously, reenacting precisely the same language would be a strange way to make a change.) This is not, it should be noted, a situation in which Congress reenacted a statute that had in fact been given a consistent judicial interpretation along the lines that the quoted Committee Report suggested. Such a reenactment, of course, generally includes the settled judicial interpretation .... Even in the ordinary situation, the 1985 House Report would not suffice to fix the meaning of language which that reporting Committee did not even draft. Much less are we willing to accord it such force in the present case, since only the clearest indication of congressional command would persuade us to adopt a test so out of accord with prior usage.

Pierce, 487 U.S. at 567-68 (citations omitted). In this case, the 1982 amendments to the Voting Rights Act reinforced the validity of the *Beer* retrogression standard because of the presumption that the congressional reenactment of Section 5, without change, constituted congressional approval of prior judicial interpretations.

In *Pierce*, this Court also rejected the 1985 committee report because such a later report is irrelevant in interpreting an earlier statute. "[I]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. *Id.* at 566-67. In this case, the 1982 Senate Report is similarly irrelevant because (1) it is a meaningless interpretation of the language of Section 5 as originally enacted in 1965, and (2) there was no Section 5 language that the report could be

explaining. Moreover, the sheer scope of the change the DOJ would impart from Footnote 31 of the Senate Report is much greater than the minor change advocated in *Pierce*. Rather than acting as a freezing remedy, the statute would empower the DOJ with authority to review the propriety of every electoral practice of every covered jurisdiction, no matter when enacted. Such an interpretation bears no relationship to the purpose of Section 5. Walbert, *Georgia's Experience with the Voting Rights Act: Past, Present, and Future*, 44 EMORY L.J. 979, 1000-01 (1995) (Walbert). In fact, the DOJ's misuse of legislative history seems a prime example of Justice Scalia's concern in *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment), that "legislative history [is] the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." The court below correctly refused to endorse the DOJ's theory.

B. Evidence of an Alleged Section 2 Violation May Not Be Used to Demonstrate Discriminatory Purpose in a Section 5 Preclearance Proceeding

1. Failure to Maximize Majority-Minority Districts Does Not Demonstrate Discriminatory Purpose

The DOJ's secondary argument, assuming that this Court declines to import Section 2 into Section 5, is that evidence of a Section 2 violation should be used as evidence of discriminatory purpose under Section 5. *Bossier Parish*, 907 F. Supp. at 445. The purpose prong of Section 5 requires the denial of preclearance if there is a constitutional violation. The purposeful discrimination component of Section 5 is coextensive with the constitutional standard as described in *Washington v. Davis*, 425 U.S. 229 (1976), and *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). A covered jurisdiction cannot purposefully discriminate on the basis of race, even if there is no adverse effect on blacks as a group. *City of Pleasant Grove v. United States*, 479 U.S.

462, 471 (1987); *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975). Moreover, the failure of a covered jurisdiction to maximize the number of black-majority districts, by itself, does not support an inference of or otherwise establish a case of purposeful discrimination. States are perfectly free to use other legitimate apportionment criteria as long as they do not rely on race. Blumstein, *Shaw v. Reno and Miller v. Johnson: Where We Are and Where We Are Headed*, 26 CUMB. L. REV. 503, 510 (1995) (Blumstein).

The conclusion that a state has not carried its burden of proof on the intent issue may be justifiable if a state's plan fails to recognize concentrations of minority voters that naturally produce majority black districts under standard districting criteria. Butler, *Affirmative Racial Gerry-mandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595, 607 (1995) (Butler). During the Police Jury public hearing, in which the plan later adopted by both the Police Jury and the School Board was considered, the Police Jury stated that the black population of Bossier Parish was too far-flung to create a majority-minority district. *Bossier Parish*, 907 F. Supp. at 437. This seems to mesh with the fact that the NAACP plan containing two majority-minority districts required 46 precinct splits. *Id.* at 439. When no additional naturally occurring minority districts can be created, discriminatory intent does not appear to be a genuine basis for an objection.

As proof of discriminatory purpose, the probative value of the failure to adopt a plan more favorable to minorities should depend upon how closely the plan matches the state's districting objectives. Commentator Katherine Inglis Butler suggests the following standard: "Was the rejected plan so clearly superior in terms of the state's articulated districting objectives than the plan adopted as to suggest it was rejected for the purpose of avoiding a second majority black district?"

Butler, 26 RUTGERS L.J. at 607 n.41. Without such a standard, the argument becomes nothing more than "failure to adopt the most favorable plan means you intended to deprive blacks of a district," thereby making the de facto standard for Section 5 "maximization" of majority-minority districts. Butler, 26 RUTGERS L.J. at 609-10. In this case, the School Board only had two plans before it at the time it adopted the plan at issue in this case: the Police Jury plan and the NAACP plan. *Bossier Parish*, 907 F. Supp. at 440.

The primary reasons for adopting the Police Jury plan were that it was already precleared, thus avoiding controversy (the Board thought), and it would avoid splitting precincts (a violation of Louisiana law). The School Board demonstrated an interest in districts coterminous with Police Jury districts right after the 1990 census when the School Board asked the Police Jury to consider joint redistricting. *Bossier Parish*, 907 F. Supp. at 438. When the Police Jury rejected the School Board's proposal, the School Board hired the Policy Jury's cartographer who promptly informed the School Board that it could adopt the already precleared Police Jury plan. *Id.* Thus, the idea of using the Police Jury plan did not arise in response to the increasing controversy generated by the NAACP's demands for black majority-minority districts. *See id.* at 438 (noting that the Police Jury plan was first proposed by a School Board member in September, 1991, well before the NAACP expressed its desire to become involved in the process in March, 1992).

It is undoubtedly true that the Police Jury plan is not optimal for the School Board. *See Bossier Parish*, 907 F. Supp. at 458 (Kessler, J., dissenting) (identifying shortcomings related to traditional districting principles). However, the Constitution and the Voting Rights Act Section 5 preclearance procedures do not require adoption of the "best" possible plan. The sole requirement is that the plan comport with the Fifteenth Amendment. If the plan is as egregious as appellants assert, they will have the

opportunity to prove it in a Section 2 action. The court below expressly noted that its ruling would have no impact on a subsequent Section 2 action. *Id.* at 440.

The DOJ's apparent motivation in objecting to the very same plan it had precleared once before was to compel the state to gerrymander as many majority-minority districts as possible. The court below noted: "Defendant denied preclearance noting that the Board had adopted the Police Jury plan when it had before it a plan that provided for 2 of 12 (18%) majority-black districts in a parish with a voting-age population that is 17.6% black. The key to defendant's position in this case, similarly, is that the School Board has not provided an adequate explanation for adopting the precleared Police Jury plan when it had before it the NAACP plan." *Bossier Parish*, 907 F. Supp. at 450.

The DOJ's mission to impose as many minority districts as possible was clearly demonstrated by its intervention in *Johnson v. De Grandy*, __ U.S. __, 114 S. Ct. 2647 (1994). In *Johnson*, the DOJ argued that Section 2 required Florida to create as many majority Hispanic and black districts as possible, even though the state had provided both groups with proportional representation in areas affected by suit. *Id.* at 2659. This Court disagreed, holding that maximization was unnecessary under the law. *Id.* at 2651. To conclude that the state's first plan was discriminatory requires circular reasoning based on an invalid premise: The Act requires that a state take every opportunity to create majority black districts; every opportunity means any opportunity not expressly disallowed by federal law; because the state could have gerrymandered and did not, it therefore chose a plan which did not contain as many majority-minority districts as possible which is intentional discrimination against blacks. Butler, 26 RUTGERS L.J. at 608.

In *Miller*, this Court did not decide whether under the proper circumstances compliance with the Voting Rights

Act, on its own, could be a compelling interest. *Miller*, 115 S. Ct. at 2490-91 ("Whether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination ...."). In *Shaw*, this Court once again declined to reach the question, in part because the additional North Carolina majority-black district drawn in that case was not required under a correct reading of Section 5. This Court held that *Miller* forecloses the argument that "failure to engage in the race-based districting would have violated [Section 5]." *Shaw v. Hunt*, 116 S. Ct. at 1903. In *Miller*, which involved an equal protection challenge to Georgia's Eleventh Congressional District, Georgia contended that its redistricting plan was necessary to meet the Justice Department's preclearance demands. The Justice Department had objected to a prior plan that created only two majority-minority districts. This Court held that the challenged congressional plan was not required by a correct reading of Section 5 and, therefore, compliance with that law could not justify race-based districting. *Miller*, 115 S. Ct. at 2491. ("[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws.")

This Court reaffirmed the *Miller* holding in *Shaw*, stating that a plan, "'even if [it] fall[s] short of what might be accomplished in terms of increasing minority representation,'" "'cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.'" *Shaw*, 116 S. Ct. at 1904 (citing *Miller*, 115 S. Ct. at 2492). As in *Miller* and *Shaw*, the United States in this case relies on the purpose prong of Section 5 to explain the Department's preclearance objections, alleging that Bossier Parish, for pretextual reasons, did not create majority-minority district. *Bossier Parish*, 907 F. Supp. at 440 (noting that "all parties agree that the School Board's proposed redistricting will not have

a retrogressive effect"). In *Miller* and *Shaw*, this Court found the Government's position "insupportable." *Shaw*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492. The court below properly relied on this Court's holding in this regard. *Bossier Parish*, 907 F. Supp. at 444. The DOJ's arguments are no more compelling now than they were in the prior cases. This Court has firmly held that a "State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the Constitution,' and thus cannot provide any basis under § 5 for the Justice Department's objection." *Shaw*, 116 S. Ct. at 1904 (citing *Miller*, 115 S. Ct. at 2492 (citations omitted)).

Despite being chastised by this Court in *Miller* and *Shaw* for pursuing its expansive reading of Sections 2 and 5, the DOJ continues in this case to pursue its same policy of maximizing the number of majority-black districts that it pursued in Georgia and North Carolina.

> We explained in Miller that this maximization policy is not properly grounded in § 5 and the Department's authority thereunder. *Miller*, 515 U.S., at __; 115 S. Ct., at 2493 ("In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld"). We again reject the Department's expansive interpretation of § 5. *Id.* at __; 115 S. Ct., at 2493. *Cf. Johnson v. De Grandy*, 512 U.S. ___; 114 S.C.. 2647, 2660 (1994) ("Failure to maximize cannot be the measure of § 2").

Shaw, 116 S. Ct. at 1904 (footnote omitted).

2. To the Extent Arizona v. Reno (Relied on by Appellants and the Dissent Below) Permits Inclusion of Evidence of an Alleged Section 2 Violation in a Section 5 Preclearance Proceeding, Arizona v. Reno Should Be Disapproved

In *Arizona v. Reno*, 887 F. Supp. 318 (D.D.C. 1995), *appeal dismissed*, 116 S. Ct. 1037 (1996), the court considered the 'purpose' prong of Section 5. Citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977), the *Arizona* court held that "the historical background of the challenged decision," is one source of evidence relevant to a determination of discriminatory purpose. The *Arizona* court then held that the DOJ was entitled to reasonable discovery concerning "the extent to which historical discrimination nas affected and continues to affect the opportunity for Native Americans in Coconino and Navajo counties to participate in the political process and elect candidates of their choice." *Id.* at 323. The dissent below relied on this holding of the *Arizona* court. *Bossier Parish*, 907 F. Supp. at 455 n.4 (Kessler, J., dissenting). In particular, the *Arizona* court disagreed with the conclusion of a previous panel in *New York v. United States*, 874 F. Supp. 394 (D.D.C. 1994), that the decision to extend an existing discriminatory electoral scheme warrants an inference of discriminatory purpose only when the preexisting system is "blatantly" or "starkly" racist. *Arizona*, 887 F. Supp. at 322. *See* Note, *Recent Case: Arizona v. Reno*, 109 HARV. L. REV. 681, 683 (1996) (Note).

Although the court agreed that the mere extension of an existing discriminatory electoral system is an insufficient basis for inferring discriminatory purpose, it believed that a finding that the existing scheme was discriminatory would be one factor for a court to consider in the discriminatory purpose determination. *See Arizona*, 887 F. Supp. at 322-24. Moreover, because a showing that the existing system

violated Section 2 would not *conclusively* demonstrate that a discriminatory purpose motivated the extension of that system to the election of additional judges, the court rejected Arizona's argument that "permitting discovery into the historical background of its judicial election scheme and past discrimination against Native Americans" would be "tantamount to launching a section 2 proceeding challenging its existing electoral scheme under the guise of section 5." *Id.* at 323. The court thus denied summary judgment to Arizona on the issue of discriminatory purpose and simultaneously denied Arizona's alternative motion to limit discovery on the purpose issue "to the legislative and administrative history of the decisions to add [the] judgeships." *Id.* at 320.

By permitting consideration of the allegedly discriminatory nature of the existing electoral scheme, *Arizona v. Reno* expands the Section 5 inquiry beyond its authorized scope at the expense of state and local autonomy. *Arizona v. Reno* should be disapproved because it fails to acknowledge the congressional intent constraining the scope of a Section 5 proceeding. "The decision's failure to place appropriate limits on the preclearance inquiry raises serious federalism concerns because it allows the DOJ to use preclearance as a leverage point to coerce the ameliorative state action that a Section 5 proceeding cannot command." Note, 109 HARV. L. REV. at 683-84.

As this Court recently stated, to incur a finding that a discriminatory purpose motivated a change, the legislature must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,'" its discriminatory effect. *Miller v. Johnson*, 115 S. Ct. at 2488 (quoting *Personnel Administrator v. Feeney*, 442 U.S. at 279). Thus, even if Arizona's existing scheme is discriminatory--and even if the legislators knew that fact--a discriminatory purpose was present only if the discriminatory nature of the system, and not the increased judicial work

load, motivated the legislature's decision to increase the number of judgeships. *See New York*, 874 F. Supp. at 401. That motivation can be determined by an inquiry confined to the administrative and legislative history of the decision to add more judges.

In essence, the DOJ's objective in the *Arizona* case was not to prevent discriminatory voting changes, but to use the preclearance proceeding as a convenient forum to force both counties to change their entire existing electoral scheme from an at-large system to single-member districts. As in *New York*, it was "quite clear that [the DOJ's] real complaint" was that the state's decision to create additional judgeships "was not a step towards ameliorating what [the DOJ] perceive[d] to be a discriminatory electoral system." *New York*, 874 F. Supp. at 401. However, in *Arizona*, as in this case, Section 2 provides the proper remedy for such a claim.

Arguably, allowing a court to consider evidence concerning the preexisting system exceeds the Section 5 inquiry envisioned by Congress even when the system is blatantly racist. An inference of discriminatory purpose, however, is warranted in such a context because the discriminatory effects of the system are obvious to legislators and the public alike, obviating the need for a wide-ranging and extensive evaluation of the preexisting system. *See New York*, 874 F. Supp. at 399 (discussing the inferences that would arise from the extension of a "whites only" voting scheme). The narrow exception carved out by the court in *New York* for blatantly racist systems is the discriminatory-purpose analog of this Court's suggestion in that even absent retrogression--generally a firm requirement for the finding of discriminatory effect--a proposed change might violate Section 5 if the resulting system "so discriminates on the basis of race or color as to violate the Constitution." *Beer*, 425 U.S. at 141, 142 n.14; Note, 109 HARV. L. REV. at 684-85.

This Court has recognized that "'Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.'" *Beer*, 425 U.S. at 140 (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 57 (1975)). Thus, Congress enacted Section 5 to ensure that plaintiffs bringing Section 2 suits have a "stationary target to attack," *New York*, 874 F. Supp. at 400, and thus that Section 2 adjudications will have a real and enduring impact on state voting law. The congressional purpose underlying the Section 5 effects prong requires retrogression rather than simply a perpetuation of existing discrimination. *City of Lockhart v. United States*, 460 U.S. 125, 134 and n.10 (1983). Therefore, it must also limit the scope of the purpose prong inquiry to a consideration of evidence directly relevant to the specific decision to implement a change. Any evaluation by a court of the allegedly discriminatory nature of a preexisting electoral system in the course of a Section 5 inquiry oversteps the statutory boundaries between Section 2 and Section 5. Note, 109 HARV. L. REV. at 685.

Indeed, this Court confirmed in *Miller*, 115 S. Ct. 2475, that the Section 5 preclearance requirement exacts "federalism cost" that may not always be justified, particularly when the DOJ wields Section 5 power in pursuit of ends beyond the scope of its statutory authority. *Id.* at 2493. In *Miller*, the DOJ exceeded its statutory authority by denying preclearance to nonretrogressive changes in order to obtain a state apportionment plan that maximized African-American voting strength, a result that Section 5 clearly did not require and that constituted racial gerrymandering in violation of the Fourteenth Amendment. *See id.* at 2490-94. Such misuse of Section 5 power is precisely what *Arizona v. Reno* and the dissent below would allow. By expanding the scope of the Section 5 inquiry beyond that intended by Congress, *Arizona v. Reno* exacts serious and unwarranted federalism costs by forcing states to

defend and justify their entire existing electoral systems before implementing concededly nonretrogressive changes in their voting laws.

CONCLUSION

Appellants in this case seek to merge (both directly and indirectly) two separate and distinct provisions of the Voting Rights Act. Such a merger would not only violate the plain language of the statute and congressional intent, it would also exact federalism costs of the highest order. For the reasons set forth above, the opinion of the United States District Court for the District of Columbia should be affirmed.

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Respectfully submitted,

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